Supreme Court, U.S.
FILED

No. 03-1189 FEB 18 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAY L. LEVY, DDS,

Petitioner,

—v.—

P & R DENTAL STRATEGIES, INC. and ANTHONY PACIELLO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Can two parties contract to restrict a third party's right to enter in a contract which is protected by the Article One Section 10 of the United States Constitution and Public policy incorporating this Constitutional command (obviously reflecting the United States constitutional prohibition against this "impairment of contract?").

(2) Can Summary Judgment be granted against a "third party" to a contract which restricts his ability to find work in his profession when all acknowledge the "third party" had no notice or consideration for such a restriction?

(3) Can Summary Judgment, without complete discovery, be granted against a plaintiff in a suit involving freedom of the market and his ability to contract in that market?

Parties to the Proceeding

1. Petitioner Jay Levy DDS.

2. P & R Rental Strategies Inc. and Anthony Piaciello; defendants who denied petitioner his rights under the Constitution, State Policy, and State decisional holdings.

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Petition for a Writ of Certiorari

Petitioner Jay Levy DDS respectfully petitions the judgment of the Court of Appeals of New York State.

Opinions below

The decision of the Court of Appeals decision November 20 affirmed the Appellate Division, First Department, New York Court of Appeals, New York petition for reargument, in its turn the Supreme Court (February 18, 2001) which has the only substantive written opinion.

Jurisdiction of this Court

Jurisdiction lies under Article 3 and Amendment Eleven of the United States Constitution and statutorily under 28 USC 121 NS 28 USC 1254(1). Petitioner will follow the guidance of Rule 20.

Statement of Case

Petitioner in May 1996 entered in a contract to provide dental procedures to Defendant P & G with Defendant Pacillo. Unbeknowst to him, P and G later on December 14, 1998 entered into a contract which restricted him for two years after his from contracting to provide such services to another agency after the termination of the Contract between Defendants:—when Doctor Levy's activities were deemed no long necessary by Metlife for whom Defendant P and G Defendant P & G had engaged his services. (June 1999). In June 1999 not only did P & G deny Petitioner his rights to work in his field but pursuant to the contract—made only between Defendants-petitioner was prohibited from applying anywhere (unknown to him and no waiver paid

to him) in the business. The Constitution forbids impairment of Contract as does Public policy (including in New York) See eg. *Best v. Yutaka*, 90 NYS 2nd 833 (1997) incorporating this Constitutional consideration which forbids such attempts to prevent freedom of Contract. This case represents both issues in addition to which it presents the issue of premature granting of Summary Judgment.

New York courts have long disfavored covenants that restrict the ability of individuals to procure employment, even when freely negotiated and contracted. This judicial disfavor properly reflects "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood." *See e.g., Columbia Ribbon & Carbon Mfg. v. A-1-A. Corp.*, 42 N.Y.2d 496, 499 (1977) (citing cases); *American Inst. of Chemical Eng'rs v. Reber-Friel Co.*, 682 F.2d 382, 386-87 & n.6 (2d Cir. 1982)(citing *Mitchel v. Reynolds*, 1 P.Wms. 181, 24 Eng. Rep. 347 (Q.B.1711) and Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 629 (1960), for historical discussion of how restrictive covenants have been frowned upon because of the "mischief" they cause first, in the possible loss of the covenantor's means of earning a livelihood and, second, in the loss to society of the services of a useful member); *Great Lakes Carbon Corp. v. Koch Ind., Inc.*, 497 F. Supp. 462 (S.D.N.Y. 1980); *Greenwich Mills v. Barrier Coffee Shop*, 91 A.D.2d 398, 404 (2d Dep't 1983) (decision rendering nonsolicitation covenants "virtually purposeless"). The Appellate Division ignored this line of cases, and therefore erred as a matter of law in affirming the Supreme Court's order granting summary judgment.

Most recently in *BDO Seidman v. Hirshberg*, this Court has recognized and followed *Columbia Ribbon*. *BDO Seidman v. Hirshberg* 93 N.Y.2d 382, 389 (1999)

(framing modern rule that a restrictive covenant in an employment agreement will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the former worker.)

Appellant *a fortiori* should have that principle applied to him as non-signatory to a contract that adversely affected his ability to procure employment without notice or consideration and that was, indeed, unknown to him until after its termination. Appellant was thereby denied a remedy for the loss of his reasonable expectations, in violation of the core tenet that knowledge of the terms is a necessity for contracts to be valid. *See generally,* Jonathan A. Weiss, *Freedman Cases on Contracts*, 35 Geo. Wash. L. Rev. 627 (1967) (contracts in general exist to give remedies for reasonable expectations induced by what is known and offered. This case presents a stronger reason against "restrictive covenants against contracting" (seeking to achieve by indirection what is prohibited when sought directly).

Columbia Ribbon and *BDO Seidman v. Hirshberg* discussed in Point II above reflect the important constitutional right of contract. ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, Sec. 10.) The impact of this clause is clearly behind the public policy against denying an individual the right to enter into contracts of employment. Therefore, if the State intrudes upon this right, it violates not only the individual's contractual rights but also his constitutional rights. *See generally, West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 393 (1937); *Missouri v. Day-Brite Lighting,* 240 S.W.2d 886, 894 (Mo. 1951), *aff'd.* 342 U.S. 421 (1952) (recognizing general right to enter employment contracts protected by Constitution).

Defendant P & R consults with medical providers for independent review of claims of dental services. As discovery is not complete we do not know its share of the market place. One of its clients was Metropolitan Life Insurance (whose share of the market we also do not know for the same reason.). In December 1998 P & R entered into a contract with Metropolitan life to provide dentists for evaluation of claims. Dr. Jay C, Levy was hired in 1996 before that agreement was reached and never told that an additional clause was added to his condition of employment stating he could not apply for employment in that field and in particular with Metlife. Negotiations in this regard were futile. Dr. Levy then sued on November 3, 1999 when Dr. Levy sought to regain his freedom to Contract in the field. On May December 2001, the Court changed the Motion to Dismiss and granted instead Summary Judgment. No hearing was held about the conditions surrounding the Contract or the market place for anti-trust purposes although Petitioner had pled the Sherman Act. On February 18, 2003 the Appellate Division First Department Supreme Court of New York denied an appeal and then a Motion for reargument (July 10, 2003). A Motion for Leave to appeal to the New York State Court of Appeals was denied on November 20, 2003. Petitioner seeks a Petition of Certiorari to insure a free market place and freedom of Contract.

Petition for Certiorari

Dr. Jay C. Levy respectfully petitions for a writ of certiorari to review the Judgment of the New York State of Appeals.

Constitutional and Statutory Provisions involved

This case involves the provision of Article 1, Section 10, and the First and Fourteenth Amendments to the United States Constitution. There is no statutory case law decided either in New York or in this Court, but the import of the relevant case predicates a Petition for Certiorari.

REASONS FOR GRANTING PETITION

This case will permit this Honorable Court to issue an opinion preserving the Constitutional Right to contract; the rights of third parties who do not get notice or consideration concerning covenants not to compete, and reaffirm that Summary Judgment may not be granted until Discovery is complete.

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted,

JONATHAN A. WEISS
130 West 42nd Street
New York, New York 10036

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

1-10 Mo. No. 950

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of November 2003.

Present, HON. JUDITH S. KAYE, *Chief Judge*, presiding.

JAY L. LEVY, DDS,

Appellant,

—v.—

P&R DENTAL STRATEGIES, INC, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

STUART M. COHEN

Stuart M. Cohen
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on July 10, 2003.

M-1524
Index No. 118962/99

Present Hon. Richard T. Andrias,
Justice Presiding,
Joseph P. Sullivan
Ernst H. Rosenberger
David Friedman
Luis A. Gonzalez,
Justices.

JAY L. LEVY, DDS,

Plaintiff-Appellant,

—against—

P&R DENTAL STRATEGIES, INC., et al.,

Defendants-Respondents.

Plaintiff-appellant having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on February 18, 2003 (Appeal No. 201),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

Catherine O'Hagan Wolfe
Clerk

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

JAY L. LEVY, DDS,

Plaintiff-Appellant,

—against—

P&R DENTAL STRATEGIES, INC., et. al.,

Defendants-Respondents.

Andrias, J.P., Sullivan, Rosenberger, Friedman, Gonzalez, JJ. 201

Attorneys, Chinyere Okoronkwo, Robert D. Goldstein

Order, Supreme Court, New York County (Richard Braun, J.), entered January 7, 2002, which, to the extent appealed from as limited by the brief, granted defendants' motion for summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic advantage, unanimously affirmed, with costs.

Summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic advantage was proper since there is no triable issue as to whether defendants employed wrongful means or acted solely to harm plaintiff when they sought to prevent plaintiff from obtaining employment with the Metropolitan Life Insurance Company (MetLife). Pur-

suant to the agreement between defendant P&R Dental Strategies, Inc. (P&R) and MetLife, P&R dental consultants such as plaintiff, employed by P&R to review claims filed with MetLife, were not to be hired away from P&R by MetLife until two years subsequent to the agreement's termination, a period that had not elapsed at the time plaintiff sought a consulting position with MetLife. Defendants committed no wrong, much less one sufficiently egregious to support a claim for interference with prospective economic advantage (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 300), in refusing to waive the economic protection to which P&R was purportedly contractually entitled (*see Thur v IPCO Corp.*, 173 AD2d 344, 345, *lv dismissed* 78 NY2d 1007).

While we reject the arguments raised on the appeal, it is not frivolous within the meaning of 22 NYCRR § 130-1.1 and thus affords no ground for the imposition of the sanctions, costs and fees sought by defendants.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: February 18, 2003

CATHERINE O'HAGAN WOLFE

Clerk

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JAY L. LEVY, DDS

—v.—

P&R DENTAL STRATEGIES INC.
and ANTHONY PACIELLO

DECISION AND ORDER OF THE
HON. RICHARD F. BRAUN, DATED
DECEMBER 24, 2001 APPEALED FROM WITH
NOTICE OF ENTRY, DATED JANUARY 29, 2002

PRESENT: Hon. RICHARD F. BRAUN J.S.C Part 23

INDEX NO. 118962/99

MOTION DATE October 30, 2001

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this for motion summary judgment.

Notice of Motion: Corrected Notice of Motion—Affidavits—Exhibits . . .

Answering Affidavits—Exhibits_____

Replying Affidavits_____

Papers/Numbered

1, 1a

2, 2a, 3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted to [illegible copy] of [illegible copy] Defendants summary judgment dismissing the complaint.

See Separate Opinion

Dated: New York, New York, December 24, 2001

Enter Richard F. Braun J.S.C.

Check one: ☒ Final Disposition

☐ Non-Final Disposition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

Index No. 118962/99
Filed January 7, 2002

JAY L. LEVY, DDS,

Plaintiff(s),

—against—

P&R DENTAL STRATEGIES, INC.
and ANTHONY PACIELLO,

Defendant(s).

OPINION

RICHARD F. BRAUN, J.:

This is an action for tortious interference with prospective economic advantage, tortious interference with contract, and violations of General Business Law § 340 and 15 USC § 1. Defendants moved to dismiss, pursuant to CPLR 3211(a)(1) and (7). By Decision and Order, dated May 13, 2001, this Court denied the branch pursuant to CPLR 3211(a)(1), and converted the other

branch to one for summary judgment (*see, Rich v Lefkovits*, 56 NY2d 276, 278-279 [1982]). The parties were given the opportunity to submit further papers on the summary judgment motion and did so.

Plaintiff argues that he was a third party beneficiary of the contract between Defendant P & R Dental Strategies, Inc. and Metropolitan Life Insurance Company. He was, not. Rather he was an incidental beneficiary of the contract (*see, Artwear Inc. v Hughes*, 202 AD2d 76, 81 [1st Dept 1994]).

Plaintiff's first claim must fail. He has not shown that Defendants have acted by wrongful means or with the sole purpose of causing harm to Plaintiff (*Snyder v SONY Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). The cause of action should be dismissed.

In order to recover for tortious interference with contract, one must show that there was an existing contract (*see, Israel v Wood Dolson Co., Inc.*, 1 NY2d 116, 120 [1956]). Plaintiff is not relying on any contract to which be was a party. Thus, that cause of action cannot stand, and must be dismissed.

General Business Law § 1340 declares contracts that constitute monopolies or which are in restraint of trade to be illegal and void. The instant contractual provision is a reasonable way of Defendants' protecting their interests and does not unreasonably bar Plaintiff from pursuing his profession (*see, Becker v Peress*, 111 AD2d 892 [2nd Dept 1985]; *cf., People v Roth*, 52 NY2d 440, 447 [1981] [the medical profession was held not to be criminally liable under General Business Law § 340]). Thus, that claim too should be dismissed.

General Business Law § 340 is based upon 15 USC § 1, but the latter is narrower than the former (*State of New York v. Mobil Oil Corp.*, 38 NY2d 460, 463-464

[1976]). Thus, that cause of action also falls and must be dismissed.

Therefore, none of Plaintiff's causes of action are viable. Summary judgment should be granted to Defendants dismissing the Complaint.

Dated: New York, New York
December 24, 2001

RICHARD F. BRAUN, J.S.C.

RICHARD F. BRAUN, J.S.C.

Supreme Court, U.S.
FILED
MAR 2 2 2004
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(2)

No. 03-1189

IN THE

Supreme Court of the United States

JAY L. LEVY, DDS,

Petitioner,

v.

P&R DENTAL STRATEGIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Respondents were entitled to summary judgment dismissing Petitioner's common law claim for tortious interference with prospective economic advantage, where the undisputed facts demonstrated that: (a) Respondents' contract with one of their clients precluded the client from hiring Respondents' consultants for a limited period of time, (b) the client independently determined that it would honor that provision absent a waiver from Respondents, (c) Petitioner requested that Respondents waive that provision, and (d) Respondents declined Petitioner's request for a waiver?

Respondents objects to Petitioner's first and third Question Presented. With regard to Petitioner's first Question Presented, no constitutional issues were ever raised before the trial court or the Appellate Division and no claim of a constitutional violation was ever asserted in Petitioner's complaint. Thus, the Court should not consider that question. With regard to Petitioner's second Question Presented, Petitioner abandoned his antitrust claims before pursuing an appeal, and this appeal does not involve any issues regarding "freedom of the market." The Court therefore should not consider that question.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent P&R Dental Strategies, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner Jay Levy ("Levy"), a former dental consultant for P&R, commenced this action in 1999 claiming that Respondents P&R Dental and its President Anthony Paciello (collectively, "P&R")[1] tortiously interfered with prospective business relations and committed antirust violations[2] by declining Levy's request that P&R waive a contractual provision in which one of P&R's clients agreed not to hire P&R consultants for a limited time period. This petition represents Levy's most recent attempt to revive his ill-advised lawsuit, which was properly dismissed by the trial court more than two years ago. The Supreme Court of the State of New York, Appellate Division (First Department) unanimously affirmed that dismissal and later denied Levy's motion for reargument and/or leave to appeal. Levy's subsequent attempt to have the New York Court of Appeals grant him leave to appeal was similarly rejected.

Levy now seeks the extraordinary relief of a Writ of Certiorari. In a desperate attempt to persuade this Court to grant him that Writ, Levy even misrepresents to the Court that he was denied discovery in the underlying action, although he knows perfectly well that he was given a full opportunity to take discovery — and that he completed all discovery — well before the trial court granted P&R's motion for summary judgment.

---

1. Inexplicably, Levy refers to P&R as "P&G" throughout the Petition.

2. Levy abandoned his antitrust claims on appeal to the Appellate Division, choosing only to appeal dismissal of his claim for tortious interference with prospective economic advantage.

Levy also disingenuously mischaracterizes the issues on appeal. Levy's appeal was limited solely to the trial court's dismissal of his common law claim for tortious interference with a prospective contract. Yet, in a transparent attempt to invoke this Court's jurisdiction, Levy now tries to claim his appeal involves a constitutional deprivation, despite the fact that P&R is not a state actor and no constitutional claim was ever raised at the trial court level or with the Appellate Division. The only issue on appeal was the existence of a triable issue of fact regarding Levy's common law tortious interference claim. The trial court and the Appellate Division held unequivocally that there were no such factual issues and dismissed Levy's complaint based on longstanding, well settled New York law. The New York Court of Appeals similarly refused to even allow Levy to pursue a further appeal. There is no basis for Levy to now have the issue revisited yet again by this Court based on the false pretense of a constitutional issue.

STATEMENT OF THE CASE

1. P&R's Contract With MetLife

P&R is a private medical consulting firm that provides independent reviews of claims for dental services submitted to P&R's clients, which consist of self-insured employers and insurance carriers. (R-15.)[3] Dr. Anthony Paciello is the President of P&R. (R-15.) In order to provide its clients with independent dental claims review services, P&R retains licensed dentists who serve as independent contractors to perform the claims reviews services for P&R. (*Id.*)

---

3. References to the Record on Appeal are denoted as "R-__."

One of P&R's clients was Metropolitan Life Insurance Company ("MetLife"). On December 24, 1998, P&R and MetLife entered into a contract which provided that P&R would review claims for dental services submitted by MetLife's insureds (the "MetLife Contract"). (R-12-14). Paragraph 13 of the MetLife Contract provides:

> . . . MetLife agrees not to hire or employ any dental consultant that has a current contractual relationship to do MetLife Claim Review with P&R Dental Strategies, Inc. (or had a contractual relationship at any time during two years prior to termination of the agreement) for the duration of this agreement and two years subsequent to this agreement's termination.

(R-14.)

Paragraph 13 of the MetLife Contract is of paramount importance to P&R because its dental consultants constitute its single most important and valuable resource. (R-16-17.) The limited restriction set forth in the MetLife Contract is essential to prevent clients such as MetLife from retaining P&R for a short period of time and then, after its contract with P&R ends, raiding the P&R dental consultants who had become familiar with MetLife's claims procedures, policies, practices and requirements during the term of the contract. (R-16-17.)

2. Dr. Levy's Relationship with P&R

Dr. Levy was retained by P&R in or around May 1996 to perform independent claims review services for MetLife. (R-17.) At all times during Dr. Levy's relationship with P&R, Dr. Levy was an independent contractor providing part-time dental claims review services for P&R. (R-8, 26, 55 [Levy Dep. at p. 94, lines 18-23], 126.) Dr. Levy also maintained his own dental practice since March 1994, including the time period in which he provided claims review services for P&R.[4] (R-36 [Levy Dep. at p. 19, lines 13-20].)

In June 1999, the MetLife Contract was about to expire. In his complaint, Dr. Levy alleged that he approached MetLife on June 18, 1999 to seek employment as a dental claims review consultant for MetLife. (R-27.) Consistent with its contractual obligation to P&R, MetLife informed Levy that it would not hire him, pursuant to Paragraph 13 of the MetLife Contract, unless P&R agreed to waive that provision. (R-27, 60 [Levy Dep. at p. 116, lines 21-23; p. 117, lines 22-25], 127.) On or about June 23, 1999, Dr. Paciello met with Dr. Levy to discuss whether Dr. Levy wished to continue providing dental claims reviews services for P&R with respect to P&R's other clients. (R-128.) Dr. Levy declined P&R's offer, but did ask Dr. Paciello if P&R would waive the restriction in the MetLife Contract so he could seek a position directly at MetLife. (R-27.) P&R declined Levy's request for a waiver. (*Id.*)

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4. Levy's status as an independent contractor is undisputed. Indeed, Levy identified himself as an independent contractor in his complaint (R-26) and in his June 12, 2000 opposing affidavit. (R-126.)

3. The Commencement of This Action

Dr. Levy commenced this action against both P&R and Dr. Paciello on or about November 3, 1999. (R-30.) In his complaint, Dr. Levy asserted claims for tortious interference with contract, tortious interference with a prospective economic relationship, and violations of the Sherman Act and the Donnelly Act (New York State's antitrust statute). (R-25-30.)

On or about May 17, 2000, P&R moved to dismiss Dr. Levy's complaint for failure to state a cause of action pursuant to New York Civil Practice Law & Rules ("CPLR") §§ 3211(a)(1) and (7). (R-9-14.) On or about August 17, 2000, however, the trial court held that motion to dismiss in abeyance, lifted the automatic stay of discovery and directed the parties to complete discovery before it would rule on P&R's motion to dismiss. (That Order was omitted from the Record on Appeal prepared by Levy. *See* Appendix, at p. 5a.) The parties thereafter completed all discovery, including depositions. (R-31-119.)

On May 13, 2001, the trial court issued a decision denying that portion of P&R's motion brought under CPLR 3211(a)(1), and converting the balance of P&R's motion to one for summary judgment. (R-6.)[5] The trial court also gave the parties the opportunity to make further submissions in connection with P&R's summary judgment motion, and all parties, including Levy, submitted additional affidavits. (R-6; R-15-119; R-136-47.) At no time did Levy ever seek any additional discovery to oppose P&R's motion.

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5. The record on Appeal prepared by Levy does not contain the trial court's May 13, 2001 order. It is annexed hereto as Appendix B.

In a decision dated December 24, 2001, the trial court granted P&R's motion for summary judgment and dismissed the complaint in its entirety. (R-5-7.) Levy appealed that decision before the Appellate Division, First Department. (R-3-4.) However, Levy expressly limited his appeal to the trial court's dismissal of his claim for tortious interference with prospective economic relationship. (*See, e.g.*, Appendix to Petition, at p. 5a.) On February 18, 2003, the First Department unanimously affirmed the trial court's dismissal of Levy's tortious interference claim. (*Id.*) Levy thereafter submitted to the First Department a motion for reargument and/or leave to appeal to the Court of Appeals, which motion was denied on July 10, 2003. (Appendix to Petition, at p. 3a-4a.) Levy then made a motion to the New York State Court of Appeals, seeking to have this Court grant him reargument and/or leave to appeal to the Court of Appeals. That motion was denied on November 20, 2003. (Appendix to Petition, at p. 1a-2a.)

REASONS FOR DENYING THE PETITION

1. LEVY HAD A FULL OPPORTUNITY TO CONDUCT DISCOVERY IN THE UNDERLYING ACTION

As a threshold matter, Levy's present Petition is based on a blatant misrepresentation to this Court that Levy was denied full discovery in the underlying action. (*See* Levy Petition, at pp. i, 4 and 5.)

In truth, Levy was not only afforded a full opportunity to conduct discovery in this action, but he actually conducted and completed discovery long before P&R was granted summary judgment. (*See* R-31-119, 130-31.)

P&R initially moved to dismiss the complaint pursuant to CPLR 3211 on May 18, 2000. (R-9-10.) At oral argument on P&R's motion before Justice Braun on August 17, 2000, the trial court held that motion to dismiss in abeyance, *lifted* the stay on discovery, and ordered the parties to conduct and complete discovery. Indeed, a discovery order was issued that same day (August 17, 2000) — signed by Levy's counsel — scheduling depositions and document discovery. (*See* Appendix, at p. 5a.) The trial court's August 17, 2000 Order also adjourned the return date for P&R's motion to dismiss to October 19, 2000 — one month *after* completion of discovery. Levy's only document requests in the underlying action sought a copy of the MetLife Agreement and all written communications between P&R and MetLife concerning Levy. (*See* Appendix, at pp. 1a-4a.) P&R subsequently produced all requested documents, and Levy never raised any objections to P&R's response. In addition, Levy deposed P&R's President, Anthony Paciello, on October 5, 2000. (R-81-119.)

Long after Levy had fully completed discovery, the trial court issued an Order dated May 13, 2001 which denied that portion of P&R's motion to dismiss pursuant to CPLR 3211(e), and converted P&R's 3211(a) motion to a motion for summary judgment. (*See* Appendix, at p. 7a.) Significantly, all parties were expressly permitted to submit additional affidavits in connection with the summary judgment motion. (R-6, R-15, R-136.) Levy thereafter submitted an attorneys' affirmation in opposition to the summary judgment motion. (R-136-147.) In his opposition papers, Levy did not even try to suggest that any additional discovery was needed, much less make a showing for additional discovery as required by CPLR 3212(f). (*Id.*)

Furthermore, the purported discovery that Levy falsely claims he was denied is utterly immaterial to the only issue on appeal — *i.e.*, whether P&R tortiously interfered with Levy's prospective business relationship with MetLife. The only items of discovery Levy now claims he was deprived of consist of the "relevant market place" and the economic consequences of Levy's inability to secure employment with MetLife. (*See* Levy's Petition, at p. 3) Those issues have no bearing on the issue relevant to Levy's appeal. The *only* issue on appeal was whether P&R's refusal to consent to a waiver of the MetLife Agreement was sufficient to sustain Levy's tortious interference claim.[6]

For Levy to now falsely suggest that he was somehow deprived of discovery that he never sought, and which is irrelevant in any event, is patently improper.

2. THE CASE WAS DECIDED IN ACCORDANCE WITH LONGSTANDING WELL-SETTLED PRINCIPLES OF NEW YORK STATE LAW

Although Levy recites general legal principles regarding the enforcement of restrictive covenants under New York law, he ignores the fact that the *only* claim he sought to reinstate on appeal was his New York State common law claim for tortious interference with prospective business relationship, based on P&R's refusal to grant a waiver of its agreement with MetLife.

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6. Apart from the fact that Levy never sought any such information when he conducted discovery, despite having a full opportunity to do so, such evidence would only be relevant, if at all, to Levy's state and federal antitrust claims. Those claims were also dismissed by the trial court and Levy did not appeal the dismissal of those claims. Those claims were frivolous and properly abandoned.

New York law is well-settled that Levy's claim for tortious interference with a prospective business relationship cannot survive absent some evidence that P&R engaged in wrongful conduct. Levy failed to offer any evidence that P&R engaged in wrongful conduct of any kind, and the trial court correctly granted P&R's motion for summary judgment. In its unanimous affirmance, the First Department similarly recognized that there was no "wrongful" conduct in this case as a matter of law. Justice Braun's decision and the Appellate Division's affirmance were based on well established principles of New York law regarding tortious interference claims. *See, e.g., MLI Industries, Inc. v. New York State Urban Development Corp.*, 205 A.D.2d 998, 1000-01, 613 N.Y.S.2d 977, 980 (3d Dep't 1994) (defendant's actions to enforce its contractual rights cannot be considered wrongful or inherently tortious toward plaintiff); *Thur v. IPCO Corp.*, 173 A.D.2d 344, 569 N.Y.S.2d 713 (1st Dep't 1991) (dismissing tortious interference claim where employer threatened to enforce restrictive covenant, despite the fact that restrictive covenant might not be enforceable). *See also U.S. Reinsurance Corp. v. Humphreys*, 205 A.D.2d 187, 618 N.Y.S.2d 270 (1st Dep't 1994) (proposed tortious interference counterclaim based on letter sent by former employer to subsequent employer threatening to hold it responsible for damages was insufficient as a matter of law and properly rejected); *Bon Temps Agency Ltd. v. Greenfield*, 184 A.D.2d 280, 584 N.Y.S.2d 824 (1st Dep't 1992) (no claim for tortious interference where former employer sent letter to agency about to enter into contract with former employee warning against use of trade secrets).

There is absolutely nothing novel or unique about this relatively simple case warranting a Writ of Certiorari. There are no conflicts among New York State Courts regarding these basic legal principles and no federal questions are involved.

3. THERE ARE NO CONSTITUTIONAL ISSUES INVOLVED IN THIS CASE

Levy's desperation is further illustrated by his last-ditch effort to transform this case into a constitutional claim. P&R is not a state actor and Levy never before made any attempt to argue that he had a constitutional claim of any kind. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987). Nor did Levy ever assert a claim under 28 U.S.C. § 1983.

To the extent Levy is claiming that his constitutional rights were somehow violated by the trial court's dismissal of his complaint, or the Appellate Division's unanimous affirmance of that dismissal, his argument is misplaced. The sole issue before Justice Braun and the Appellate Division was whether there was a triable issue of fact as to whether P&R tortiously interfered with Levy's prospective business relationship with MetLife by refusing to waive a provision of the MetLife Agreement. Both the trial court and the First Department agreed that P&R's refusal to grant such a waiver was not "wrongful conduct" sufficient to support such a claim. Nothing in those rulings involve any constitutional rights of Levy or anyone else. Indeed, neither the trial court nor the First Department addressed the enforceability of the MetLife Agreement because it was immaterial to Levy's tortious interference claim. *See e.g.*, *Thur v. IPCO Corp.*, 173 A.D.2d at 345, 569 N.Y.S.2d at 713. (affirming dismissal of tortious interference claim based on letters to competitor threatening to enforce restrictive covenant, where conduct was not "wrongful" even if restrictive covenant were unenforceable).

Moreover, Levy never before asserted any claim based on constitutional principles, and cannot assert that unpreserved, untimely and legally deficient argument for the first time now. *See, e.g., Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 351, 774 N.E.2d 865, 868 (2002).

CONCLUSION

Based on the foregoing, P&R respectfully requests that Levy's petition for a Writ of Certiorari be denied in its entirety.

Respectfully submitted,

PETER L. ALTIERI
Counsel of Record
ROBERT D. GOLDSTEIN
EPSTEIN BECKER & GREEN, P.C.
Attorneys for Respondents
250 Park Avenue
New York, NY 10177-0077
(212) 351-4500

APPENDIX

APPENDIX A — NOTICE OF DISCOVERY AND INSPECTION DATED DECEMBER 13, 1999 AND LETTER FROM RICHARD O. HUGHES, ESQ. TO JUSTICE RICHARD F. BRAUN DATED NOVEMBER 29, 2000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.:
118962/99

JAY L. LEVY, DDS,

Plaintiff,

-against-

P & R DENTAL STRATEGIES, INC. and
ANTHONY PACIELLO,

Defendants.

NOTICE FOR DISCOVERY AND INSPECTION

COUNSEL:

Pursuant to CPLR 3101 et seq. the plaintiff demands that you produce for inspection and copying at the offices of the undersigned, 217 Broadway, New York, New York 10007, Suite 309, on December 28, 1999 at 9:30 A.M., the following:

1. Contract dated December 24, 1998 between P & R Dental Strategies, Inc. and Met Life.

Appendix A

2. All written communications between P & R Dental Strategies, Inc. and Met Life concerning plaintiff.

Yours, etc.

ALBERT & KAUFMAN, LLP

By: s/ Morton Alpert
Attorneys for Plaintiffs
Office & P.O. Address
217 Broadway
New York, New York 10007
212-349-2000

Dated: New York, New York
December 13, 1999

TO: EPSTEIN BECKER & GREEN, P.C.
Attorneys for defendants
250 Park Avenue
New York, New York 10177

Appendix A

Epstein Becker & Green, P.C.
Attorneys at Law
250 Park Avenue
New York, New York 10177-1211
(212) 351-4500

November 29, 2000

The Honorable Richard F. Braun
Part 23, Room 320
80 Centre Street
New York, New York 10013

Re: Jay L. Levy v. P&R Strategies and Anthony Paciello
Index No.: 118962-99

Dear Justice Braun:

We represent defendants P&R Dental Strategies and Anthony Paciello (collectively "defendants") in the above-captioned matter. We respectfully request that defendants' pending motion to dismiss be returned to the calendar and that the Court consider the merits of the motion accordingly.

The procedural history of the pending motion is as follow. On May 18, 2000, defendants moved for an Order dismissing plaintiff's claims based on documentary evidence and on plaintiff's failure to state a claim. On August 17, 2000, the Court withheld judgment on the motion and ordered the completion of certain discovery, including party depositions, and scheduled a compliance conference for October 17, 2000. At the October 17 conference, plaintiff requested, and

received, a further adjournment until November 16, 2000, to supplement its opposing papers with additional facts purportedly gleaned from the completed discovery. (See attached Compliance Conference Order.)

As of today, plaintiff has not submitted any additional opposing papers. Defendants, on the other hand, need not submit further papers because their position remains unchanged from their original motion to dismiss; that is, plaintiff's claims fail as a matter of law and the Court-ordered discovery has not produced any new facts upon which plaintiff may rest his claims.

Discovery is now complete. Plaintiff has had a full opportunity to supplement his pleadings (and has chosen not to). Defendants respectfully request that the Court assign the earliest return date convenient to the Court.

Very truly yours,
s/ Richard O. Hughes
Richard O. Hughes

cc: Robert Goldstein, Esq.
Morton Alpert, Esq.
Dr. Anthony Paciello

APPENDIX B — COMPLIANCE CONFERENCE ORDER

FM. T5-13a

Rev. (2/1/93)

SUPREME COURT, COUNTY OF NEW YORK

INDIVIDUAL ASSIGNMENT PART (OR JUSTICE) _____

JAY L. LEVY
Plaintiff(s),

-against-

P & R DENTAL STRATEGIES AND ANTHONY PACIELLO
Defendant(s),

Index No. 118962-99

COMPLIANCE

~~PRELIMINARY~~ **CONFERENCE ORDER**

(**202.8 and 202.12 of the Uniform Rules)

APPEARANCES
Plaintiff(s): MORTON ALBERT

Defendant(s): RICHARD HUGHES

It is hereby ORDERED that disclosure shall proceed as follows:

(1) **Insurance Coverage:** If not already provided, shall be furnished by _____ on or before _____.

(2) **Bill of Particulars:**
(a) Demand for a bill of particulars shall be served by _____ on or before _____.
(b) Bill of particulars shall be served by _____ on or before _____.
(c) A supplemental bill of particulars shall be served by _____ as to Items _____ on or before _____.

(3) **Medicial Reports and Authorizations:**
Shall be served as follows: _____

(4) **Physical Examination:**
(a) Examination of _____ shall be held _____
(b) A copy of the physician's report shall be furnished to plaintiff within _____ days of the examination.

(5) **Depositions:** Depositions of
[ ] Plaintiff(s) [ ] Defendant(s) [✓] All Parties shall be held SEPT. 27, 2000 AT 10:00 A.M. AT DEFTS ATTYS OFFICE, DEF TO BE DEPOSED FIRST.

(6) **Other Disclosure:**
(a) All parties, on or before _____, shall exchange names and addresses of all witnesses, statements of opposing parties and photographs, or, if none, provide an affirmation to that effect.
(b) Authorization for plaintiff(s)' employment records for the period _____ shall be furnished on or before _____.
(c) Demand for discovery and inspection shall be served by _____ on or before _____.
The items sought shall be produced to the extent not objected to, and objections, if any, shall be stated on or before _____.
(d) Other [interrogatories, etc.] _____

BEST AVAILABLE COPY

Appendix B

FM. 1S-13b Rev. (2/1/93)

(7) End Date for all Disclosure [must be within 12 months]: SEPT. 29, 2000

(8) Impleader: Shall be completed on or before —

(9) Motions: Any dispositive motion(s) shall be made on or before PENDING MOTION TO DISMISS COMPLAINT ADJOURNED TO OCT. 19, 2000

(10) Note of Issue: Plaintiff shall file a note of issue/certificate of readiness on or before OCTOBER 20, 2000. A copy of this stipulation and order, an affirmation stating that the terms of the stipulation and order have been complied with, and an affidavit of service of the affirmation and note of issue shall be served and filed with the note of issue on or before said date.

(11) If a motion relating to disclosure has raised additional disclosure issues, the parties agree as follows:

(12) Compliance conference shall be held on OCTOBER 17, 2000, 11:00 A.M.

Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

SO ORDERED:

J.S.C.

Dated: 9/7/00

A PENALTY SHALL BE IMPOSED FOR ANY NON-COMPLIANCE, UNLESS GOOD CAUSE IS SHOWN THEREFOR.

D-452d

ADDITIONAL DIRECTIVES

In addition to the directives set forth on the annexed pages, it is further ORDERED as follows:

DEFENDANTS SHALL COMPLY WITH ALL DOCUMENT DISCOVERY REQUESTS OF PLAINTIFF AS DESCRIBED IN THE PRELIM. CONF. ORDER OF MARCH 14, 2000 AND PRIOR D/I NOTICES, ALL ~~outstanding~~ BY SEPTEMBER 8, 2000.

Dated: 9/7/00

SO ORDERED:

PROOF OF THE FILING OF A NOTE OF ISSUE WITH THE TRIAL SUPPORT OFFICE SHALL BE FILED WITH THE CLERK OF PART 23

APPENDIX C — SHORT FORM ORDER DATED MAY 13, 2001

1

STRUCTURAL COPY

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J. Justice PART 1A Part 23

Jan Lenk, DDS

-v-

PTR Dental Strategies et al.

INDEX NO. 116542/99

MOTION DATE 2/1/01

MOTION SEQ. NO. 003 (Pltf-mot-seq)

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for dismiss

PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1
Answering Affidavits — Exhibits
Replying Affidavits

FILED
MAY 30 2001
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied as to the branch under CPLR 3211(a)(1) because that ground was waived (CPLR 3211(e)), and the branch of the motion under CPLR 3211(a)(7) is converted to a motion for summary judgment, of which the parties are notified pursuant to CPLR 3211(c) (Rubin v Liotta, 56 NY2d 276, 278-279 (1982)), and it is further

ORDERED that the parties may serve any supplemental affidavits on the converted motion on or before May 31, 2001, and it is further

ORDERED that the parties shall appear before the Court on the scheduled converted motion on June 7, 2001 at 9:30 AM.

ENTER:

Dated: New York, New York, May 13, 2001

Richard F. Braun
J.S.C.

JUSTICE

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION